

O

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

LE T. LEUNG,	)	Case No. CV 06-07593-MLG
	)	
Plaintiff,	)	MEMORANDUM OPINION AND ORDER
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the	)	
Social Security	)	
Administration,	)	
	)	
Defendant.	)	
_____	)	

This is an action for judicial review of the Commissioner's final decision denying Plaintiff Le T. Leung's application for Social Security Disability Insurance benefits. For the reasons set forth below, the case shall be remanded for further proceedings.

**I. Background**

Plaintiff filed for benefits on January 22, 2002, when she was forty-six years old, alleging that she became disabled and unable to work on December 31, 2000, due to diabetes, dizziness, insomnia, and seizures. (Administrative Record ("AR") 68-70.) The Social Security

1 Administration denied benefits initially and upon reconsideration, and  
2 a *de novo* hearing was held before an Administrative Law Judge ("ALJ") on  
3 October 15, 2002. (AR 14-22.) In a decision issued on November 25, 2002,  
4 the ALJ determined that Plaintiff is not disabled and not entitled to  
5 disability benefits. (AR 17-22.) Plaintiff sought judicial review of the  
6 ALJ's decision and on November 24, 2003, pursuant to the parties' joint  
7 stipulation, this Court remanded the case to the Commissioner in order  
8 to "further evaluate the claimant's mental illness." *Leung v. Barnhart*,  
9 No. CV-03-2555-MLG (C.D. Cal. 2003); (AR 241-42).

10 Plaintiff filed a subsequent application for disability insurance  
11 benefits on May 2, 2003, which was denied. (AR 307-10, 361-63.)  
12 Plaintiff requested a *de novo* hearing, and the 2002 and 2003  
13 applications were consolidated and both were heard before ALJ Joel B.  
14 Martinez. (AR 197.) A hearing was started on May 27, 2005, and was  
15 continued on October 19, 2005. (Id.) In a decision dated December 14,  
16 2005, the ALJ found that Plaintiff was not disabled within the meaning  
17 of the Social Security Act at any time through the date of decision. (AR  
18 196-209). The ALJ specifically found: 1) Plaintiff has not engaged in  
19 substantial gainful activity since the alleged onset date; 2) Plaintiff  
20 has severe impairments consisting of diabetes mellitus, a complex  
21 partial seizure disorder, and a dysthymic disorder; 3) these impairments  
22 do not meet or medically equal any of the listed impairments in the  
23 governing regulations; 4) Plaintiff has no exertional limitations, but  
24 she should not work at unprotected heights or around dangerous  
25 machinery; she should not drive or work in a cold environment; and she  
26 is limited to simple work; and 5) based on the testimony of a vocational  
27 expert, that there are significant numbers of jobs in the national  
28 economy that Plaintiff can perform, such as laundry worker, rack loader,

1 and machine feeder.

2 The Appeals Council denied review. (AR 168-69.) Plaintiff then  
3 commenced this action for judicial review, raising a single claim of  
4 error: that the ALJ failed to properly account for Plaintiff's  
5 illiteracy in concluding that there are available jobs in the national  
6 economy. (Jt. Stip. 5-9.)

## 7 8 **II. Standard of Review**

9 Under 42 U.S.C. § 405(g), a district court may review the  
10 Commissioner's decision to deny benefits. The Commissioner's or ALJ's  
11 decision must be upheld unless "the ALJ's findings are based on legal  
12 error or are not supported by substantial evidence in the record as a  
13 whole." *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial  
14 evidence means such evidence as a reasonable person might accept as  
15 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389,  
16 401 (1971); *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It  
17 is more than a scintilla, but less than a preponderance. *Robbins v. Soc.*  
18 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). To determine whether  
19 substantial evidence supports a finding, the reviewing court "must  
20 review the administrative record as a whole, weighing both the evidence  
21 that supports and the evidence that detracts from the Commissioner's  
22 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If  
23 the evidence can support either affirming or reversing the ALJ's  
24 conclusion," the reviewing court "may not substitute its judgment for  
25 that of the ALJ." *Robbins*, 466 F.3d at 882.

26 //

27 //

28 //

### 1 III. Discussion and Analysis

2 Plaintiff claims that the ALJ erred at the fifth and final step of  
3 the sequential disability analysis<sup>1</sup> by incorrectly classifying  
4 Plaintiff's educational background under the regulations as "limited"  
5 rather than "illiterate" or "unable to communicate in English."

6 Because Plaintiff was able to establish that she is not able to  
7 perform her past relevant work, the Commissioner had the burden of  
8 showing that Plaintiff can perform other work that exists in significant  
9 number in the national economy. *Lounsbury v. Barnhart*, 468 F.3d 1111,  
10 1114-15 (9th Cir. 2006). The Commission can meet this burden in two  
11 ways: (1) through the testimony of a vocational expert ("VE"); or (2) by  
12 reference to Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart  
13 P, App. 2, §§ 200.00-204.00 ("the grids"). *Osenbrock v. Apfel*, 240 F.3d  
14 1157, 1162 (9th Cir. 2001).

15 A claimant's education is one of the factors used to assess whether  
16 the claimant can perform available jobs. See 42 U.S.C. § 423(d)(2)(A);  
17 *Garcia v. Sec'y of Health & Human Servs.*, 46 F.3d 552, 555 (6th Cir.  
18 1995) ("Congress clearly intended the Secretary to consider education  
19 when determining whether the claimant can perform other substantial  
20 gainful work which exists in the national economy"); "Education is  
21 primarily used to mean formal schooling or other training which  
22 contributes to [the claimant's] ability to meet vocational  
23 requirements...." 20 C.F.R. § 404.1564(a). "The term education also  
24 includes how well [the claimant is] able to communicate in English since  
25 this ability is often acquired or improved by education." *Id.* §  
26 404.1564(b). The Commissioner uses five categories in assessing

---

27 <sup>1</sup> See *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999)  
28 (detailing the five-step sequence).

1 educational level: illiteracy; marginal education; limited education;  
2 high school education and above; and inability to communicate in  
3 English. Id. §§ 404.1564(b)(1)-(5).

4 Under the regulations, the Commissioner "generally consider[s] that  
5 a 7th grade through the 11th grade level of formal education is a  
6 limited education." 20 C.F.R. § 404.1564(b)(3). At the hearing the ALJ  
7 found that Plaintiff had received an 8th grade education and thus had a  
8 limited education. (AR 555.) The ALJ then elicited the following  
9 testimony from a VE in making the step five determination in this case:

10 [ALJ]: [I]f I give you a hypothetical person of the  
11 claimant's age, education, and work history that  
12 would have no exertional limitations, would be  
13 precluded from working at heights or around  
14 dangerous machinery, no driving, and no cold  
15 environment, and limited to simple work, would such  
16 a person be able to perform the claimant's past  
17 relevant work?

18 [VE]: No.

19 [ALJ]: Is there any other work that could be performed by  
20 such a person?

21 [VE]: Yes, Your Honor. I could provide the Court with  
22 three samples.

23 (AR 557.) The VE then went on to identify Laundry Worker I, Dictionary  
24 of Occupational Titles ("DOT") No. 361.684-014, Rack Loader, DOT No.  
25 590.687-018, and Medium Machine Feeder, DOT No. 699.686-010, as jobs  
26 that are available in the national economy that Plaintiff can perform.  
27 (AR 557.) In the ALJ's written decision he concluded that there were a  
28 significant number of jobs in the national economy that Plaintiff could

1 perform "[b]ased on the testimony of the [VE], and considering the  
2 claimant's age, education, work experience and residual functional  
3 capacity." (AR 208.) Relying on the VE's testimony, the ALJ specifically  
4 cited Laundry Worker I, Rack Loader, and Machine Feeder as examples of  
5 such jobs. (Id.) The ALJ also stated that he used section 204.00 of the  
6 grids as a framework for determining that jobs existed which Plaintiff  
7 could perform. (Id.)

8 "In order for the testimony of a VE to be considered reliable, the  
9 hypothetical posed must include 'all of the claimant's functional  
10 limitations, both physical and mental' supported by the record." *Thomas*  
11 *v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002); accord *Robbins*, 466 F.3d  
12 at 886. Significantly, the ALJ posed a hypothetical in which the  
13 individual had a limited education,<sup>2</sup> a finding that has no basis in the  
14 record. Plaintiff immigrated to the United States in 1986, when she was  
15 31 years old. (AR 68, 520.) Although Plaintiff had six years of formal  
16 education in Vietnam and can read and write in Vietnamese, she studied  
17 English at night classes for only a short period of time upon arriving  
18 in the United States and indicated on her application for benefits that  
19 she cannot read, write, or speak English. (AR 75, 77, 86, 519-20.)  
20 Plaintiff required an interpreter at the administrative hearings and at  
21 various medical visits. (AR 146, 471, 518.) All the evidence points to  
22 the conclusion that Plaintiff is unable to communicate in English, 20  
23

---

24 <sup>2</sup> In the his decision, the ALJ finds that Plaintiff is marginally  
25 educated, which generally means that the claimant has received "formal  
26 schooling at a 6th grade level." 20 C.F.R. § 404.1564(b)(2). As  
27 discussed below, substantial evidence in the record supported an  
28 educational level of illiteracy. Even if the Court accepts "marginally  
educated" as the ALJ's finding, it was not supported by the record. But  
because the Court is concerned with the hypothetical as posed to the VE,  
the finding of limited education is used.

1 C.F.R. § 404.1564(b)(5), which also makes her illiterate under the  
2 regulations, *id.* § 404.1564(b)(1). See *Pinto v. Massanari*, 249 F.3d 840,  
3 846 n.3 (9th Cir. 2001) ("Illiteracy is subsumed under inability to  
4 communicate in English.") (quoting Soc. Sec. Rep. Ser. 855 Acquiescence  
5 Rul. 86-3(5) (1983-1991)). The ALJ's determination at step five was  
6 based in part on an educational level that was not supported by  
7 substantial evidence in the record, and therefore was in error.

8 The ALJ's use of an incorrect educational level was not without  
9 consequence. The three jobs cited by the VE as options for Plaintiff,  
10 which were also adopted by the ALJ in his findings, require that the  
11 worker possess a language level of at least one.<sup>3</sup> Dictionary of  
12 Occupational Titles, <http://www.occupationalinfo.org/>. At language level  
13 one, an individual can read at a rate of 95-120 words per minute and  
14 "[c]ompare similarities and differences between words and between series  
15 of numbers"; "[p]rint simple sentences containing subject, verb, and  
16 object, and series of numbers, names, and addresses"; and "[s]peak  
17 simple sentences, using normal word order, and present and past tenses."  
18 *Id.*, [http://www.occupationalinfo.org/appendxc\\_1.html#III](http://www.occupationalinfo.org/appendxc_1.html#III). The DOT lists  
19

---

20 <sup>3</sup> The DOT is presumptively authoritative on the characteristics  
21 of jobs in the national economy. *Pinto*, 249 F.3d at 845-46. The parties  
22 dispute the proper application of *Massachi v. Astrue*, 486 F.3d 1149 (9th  
23 Cir. 2007), to this case, but *Massachi* is inapposite. *Massachi* dealt  
24 with whether "an ALJ may rely on a vocational expert's testimony  
25 regarding the requirements of a particular job without first inquiring  
26 whether the testimony conflicts with the [DOT]." *Id.* at 1152. *Massachi*  
would bear on this case only if the VE deviated from the job  
requirements reflected in the DOT. But the issue in this case is not  
whether the hypothetical individual posed by the ALJ would be able to  
work the particular jobs, but whether the hypothetical individual  
accurately reflected the Plaintiff.

27 The Commissioner argues that the VE must have accounted for  
28 Plaintiff's illiteracy based on the VE's observations at the hearing  
(Jt. Stip. 15 n.3), but this assertion is belied by the clear wording of  
the ALJ's hypothetical.

1 the language requirements associated with a job for a reason. "The  
2 ability to communicate is an important skill to be considered when  
3 determining what jobs are available to a claimant. Illiteracy seriously  
4 impacts an individual's ability to perform work-related functions such  
5 as understanding and following instructions, communicating in the  
6 workplace, and responding appropriately to supervision." *Pinto*, 249 F.3d  
7 at 846. The evidence in this case does not support a finding that  
8 Plaintiff possesses even the minimal level of language aptitude that the  
9 jobs cited by the ALJ require.

10 Contrary to the Commissioner's contention, this reading of the DOT  
11 does not mean "that no one who does not speak English would be able to  
12 work in the United States." (Jt. Stip. 15 n.3.) Of course "[a] claimant  
13 is not per se disabled if he or she is illiterate. [This Court] merely  
14 hold[s] that in order for an ALJ to rely on a job description in the  
15 [DOT] that fails to comport with a claimant's noted limitations, the ALJ  
16 must definitively explain this deviation." *Pinto*, 249 F.3d at 847.

17 Defendant does not seem to dispute the fact that Plaintiff is  
18 illiterate, and instead argues that "in spite of the adversity of her  
19 illiteracy, substantial evidence supports the ALJ's determination that  
20 Plaintiff could perform alternative work." (Jt. Stip. 14.) Defendant's  
21 argument assumes that the ALJ's finding was informed exclusively by the  
22 application of Rule 204.00 of the grids, which applies to claimants who  
23 are able to perform heavy work. If Defendant's assumption was correct,  
24 then Plaintiff's education would arguably have no bearing on the ALJ's  
25 determination at step five because "an impairment which does not  
26 preclude heavy work...would not ordinarily be the primary reason for  
27 unemployment, and generally is sufficient for a finding of not disabled,  
28 even though age, education, and skill level of prior work experience may



1 be considered adverse." 20 C.F.R. Part 404, Subpart P, App. 2, Rule  
2 204.00.<sup>4</sup> However, the ALJ specifically stated that he based his finding  
3 on the testimony of the VE and the claimant's education, neither of  
4 which were based on substantial evidence in the record. Accordingly, the  
5 ALJ's step five determination was made in error.

6 Because Plaintiff's language limitations preclude her from  
7 performing the occupations identified by the ALJ, the matter must be  
8 remanded for the ALJ to determine whether jobs exist in the local and  
9 national economy in significant numbers that Plaintiff is able to  
10 perform.

#### 11 12 **IV. Conclusion**

13 For the reasons stated above, the Court finds that the ALJ's  
14 decision is not supported by substantial evidence. It is **ORDERED** that  
15 this case be remanded to the Commissioner for further proceedings  
16 consistent with this opinion.

17  
18 DATED: August 1, 2007



19  
20  
21 MARC L. GOLDMAN  
United States Magistrate Judge

22  
23  
24  
25  
26  
27  
28 <sup>4</sup> Plaintiff does not raise the issue of whether the ALJ's finding  
that Plaintiff can perform heavy work is based on substantial evidence  
in the record, and accordingly the Court does not address the issue.